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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 833

J. ROBERT COGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 19) and the opinion of the Circuit Court of Appeals (R. 31) are unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 29, 1928. (R. 39). The petition for certiorari was filed March 9, 1928. Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The single question in this case is whether an order of the District Court denying a motion for the return of seized papers and for the suppression of all evidence obtained therefrom, which motion was made subsequent to the indictment of the movant and entitled as in the criminal case, was a final order reviewable by the Circuit Court of Appeals.

STATEMENT

Following his indictment in the District Court of the United States for the Southern District of New York upon a charge of conspiracy to violate the National Prohibition Act, petitioner moved in that court for the return to him of certain papers and for the suppression of all evidence obtained therefrom. The motion was entitled as in the criminal case. As grounds therefor petitioner asserted in an accompanying affidavit that said papers had been taken in a search of his person by a named prohibition agent immediately preceding his arrest by that officer, who had neither a search warrant nor a warrant of arrest and who did not have probable cause for belief that petitioner was committing an offense in his presence. (R. 3–8.)

In opposition to the motion the Government filed two affidavits. The first, made by the prohibition agent who had searched the petitioner, stated facts and circumstances tending to show probable cause

for belief on the part of said officer that at the time of petitioner's arrest he was engaged in carrying out a conspiracy to violate the National Prohibition Act, and further declared that the affiant had searched the petitioner "after telling him that he was under arrest." (R. 9–13.) The second affidavit, sworn to by an Assistant United States Attorney, stated facts in corroboration of the first as to the existence of probable cause. (R. 14–15.) Petitioner filed a reply affidavit in which previous sworn statements by said prohibition agent were quoted as indicating that he did not have probable cause for arresting petitioner. (R. 16–19.)

Upon the evidence furnished by the foregoing affidavits the court found that the arrest had preceded the search and was upon probable cause. It accordingly denied the motion. (R. 19–20.) To review that order petitioner sued out a writ of error from the Circuit Court of Appeals, which dismissed the writ for want of jurisdiction on the ground that the order appealed from was an interlocutory order in the criminal case and therefore not appealable. (R. 31–34, 39.) Certiorari is asked on the ground that the Circuit Court of Appeals erred in holding that the order in question was not a final order subject to review in that court.

ARGUMENT

I

THE ORDER APPEALED FROM WAS INTERLOCUTORY

Petitioner's application for the return of the seized papers and for the suppression of all evidence obtained therefrom was entitled as in the criminal case then pending against him. The "Notice of Motion," addressed to the United States Attorney, informed that "the undersigned will move this Court on the 7th day of November, 1927," for an order granting the relief prayed. (R. 3.) The application constituted, therefore, a motion in the criminal case. Petitioner does not dispute this, but, on the contrary, states his position as follows (Pet. 7):

> An application for the return of property in the possession of prosecuting officers is a special proceeding, and if indictment is pending a special proceeding in the criminal case, and the order on the application finally determines the rights of the parties in the subject matter.

It is settled, however, that where an application for the return of seized property and for its suppression as evidence is in substance and effect a proceeding in a pending case, as distinguished from a proceeding begun by an independent petition, the order granting or denying the relief prayed is but

interlocutory in the pending case and therefore not appealable.

> *Coastwise Lumber & Supply Co.* v. *United States* (C. C. A., 2d), 259 Fed. 847, 849.
>
> *United States* v. *Maresca* (S. D., N. Y.), 266 Fed. 713, 719.
>
> *United States* v. *Marquette* (C. C. A., 9th), 270 Fed. 214, 215.
>
> *Petition of Barber* (E. D. Mich.), 281 Fed. 550, 553.
>
> *Voorhies* v. *United States* (C. C. A., 5th), 299 Fed. 275, 276.
>
> *United States* v. *Broude* (Minn.), 299 Fed. 332, 336–338.
>
> *Jacobs* v. *United States* (C. C. A., 9th), 8 F. (2d) 981, 982–983.

A similar view was expressed by this Court in *Wise* v. *Mills*, 220 U. S. 549. The record in that case shows that subsequent to the indictment of Mills in the Circuit Court of the United States for the Southern District of New York, he filed in that court a petition, entitled as in the criminal case, praying the return to him of books and papers which had been seized upon his premises by the United States Marshal immediately following the execution by that officer of a warrant for his arrest. The Circuit Court found that the documents in question had been taken in violation of the petitioner's rights under the Fourth Amendment and issued an order directing the United States Attorney, to whom they had been delivered by the Marshal, to return them to the petitioner. The

United States Attorney refused to obey this order and, being adjudged in contempt of court, sued out a direct writ of error from this Court. In the course of an opinion dismissing the writ for want of jurisdiction the Court said (p. 554):

> The only ground stated in the assignments of error which in the remotest degree refers to a matter which would come within our right to review is the third assignment, which asserts: "The court erred in adjudging that the taking into custody of said books and papers at the time of the lawful arrest of said Lawrence H. Mills, Charles G. Mourraille and Emil S. Dutlot was in violation of the provisions of the Constitution of the United States." * * * But it is obvious on the face of the record that the error thus assigned and the discussion at bar in regard to it concern themselves, not with the order which it is sought to review, that is, the commitment for contempt, *but to another and different order not final in its character, that is, the order of the court directing the return of the books and papers. Alexander v. United States*, 201 U. S. 117. (Italics ours.)

And on page 555 the Court points out the misconception of the plaintiff in error in assuming "that the right to have a direct review of the final contempt order carries with it the right to have at the same time a review of *the interlocutory order returning the books.*" (Italics ours.)

The decisions of this Court in *Perlman* v. *United States*, 247 U. S. 7; *Burdeau* v. *McDowell*, 256 U. S. 465; *Essgee Co.* v. *United States*, 262 U. S. 151, and *Steele* v. *United States No. 1*, 267 U. S. 498, upon which petitioner here relies, are readily distinguishable from the instant case. In the *Perlman case* a prior patent suit in which Perlman had appeared as a witness and in which articles belonging to him had been received as exhibits, was dismissed without prejudice, but the exhibits were impounded by order of the court. The United States Attorney thereafter instituted proceedings before a grand jury for an indictment of Perlman for perjury committed while testifying in the patent case, and applied to the court for an order directing the clerk to produce the aforesaid exhibits before the grand jury. A countervailing petition by Perlman, that the use of said exhibits as evidence by the United States Attorney be enjoined, was denied; the application of the United States Attorney was granted, and Perlman appealed directly to this Court. The Government moved to dismiss the appeal on the ground, among others, that "The order of the District Court if considered as a part of the criminal proceeding is not final, but merely interlocutory, and therefore not reviewable by this court." In denying the motion this Court said (p. 12):

> The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as

> to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

In referring to the criminal action as not yet brought notwithstanding the proceedings before the grand jury, the Court undoubtedly had in mind the rule announced in *Post* v. *United States*, 161 U. S. 583, 587, as follows:

> Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. *Virginia* v. *Paul*, 148 U. S. 107, 119, 121; *Rex* v. *Phillips*, Russ. & Ry. 369; *Regina* v. *Parker*, Leigh & Cave, 459; *S. C.* 9 Cox Crim. Cas. 475. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced; the grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court.

As, therefore, when the order reviewed in the *Perlman case* was made the proposed criminal action had not been brought and the civil action had been dismissed, the only proceedings pending were those involving the use of the exhibits as evidence, and as those proceedings were fully terminated by the order it was necessarily a final order subject to review.

In the *McDowell case* the petition prayed the return to McDowell of papers which had been stolen from him and turned over to Burdeau, a Special Assistant to the Attorney General, who proposed to use them as evidence before a grand jury to secure an indictment of McDowell for fraudulent use of the mails. The District Court granted the petition and Burdeau sought review of that order upon a direct appeal to this Court. As no criminal case against McDowell was pending and the order appealed from completely disposed of the proceedings in which it was rendered, it was obviously a final order for appellate purposes.

In *Essgee Co.* v. *United States* the petitions for the return of books and papers were filed after indictments had been returned against petitioners. The petitions were not entitled as in the criminal cases, however, but were plainly intended by the petitioners and treated by the court as the beginning of new and independent proceedings. The orders denying the petitions were, therefore, obviously final and reviewable in this Court.

In the *Steele case* prohibition agents executing a warrant to search Steele's premises found and seized intoxicating liquor. Steele thereupon appeared in the commissioner's court and moved that the warrant be quashed and the liquor returned on the ground that the warrant had issued without probable cause. The commissioner overruled the motion and Steele filed an application in the District Court for a review of the proceedings before the commissioner and for an order quashing the warrant and directing a return of the seized property. The District Court denied the application and its order was affirmed by this Court upon a direct appeal. No reference to any pending criminal case was made in the title of the petition, in the petition itself, or anywhere else in the record of the proceedings in the District Court. Whether Steele's application was made subsequent to the filing of a criminal information against him, as petitioner here attempts to show (Pet. 15, footnote), is immaterial, for the proceedings begun by that application were plainly independent of the criminal case which came to this Court upon a separate record and was disposed of as a separate case. *Steele* v. *United States No. 2*, 267 U. S. 505.

It is apparent, therefore, that none of the foregoing decisions of this Court cited by petitioner is authority for his contention that an order denying a motion in a criminal case for the return of seized property and for the suppression of its use as evi-

dence is a final order subject to review. Furthermore, no question of the jurisdiction of this Court to entertain the appeals in those cases was raised or decided, and this Court has repeatedly held that the fact that it entertained jurisdiction in a given case, no question of jurisdiction having been raised, affords no basis for holding such case authoritative as to jurisdiction in subsequent cases of like character. *Arant* v. *Lane*, 245 U. S. 166, 170; *Fritch* v. *United States*, 248 U. S. 458, 463; *Baldwin Co.* v. *Howard Co.*, 256 U. S. 35, 40.

If petitioner were correct in his assertion that the order of the District Court in the instant case finally disposed of special proceedings which were separate and distinct from the criminal case in which the motion overruled by said order was made, it would follow that all questions involving the validity of the seizure would be *res judicata* and could not again be passed upon by the court in considering objections to evidence at the trial.

In *Steele* v. *United States No. 2, supra*, it was held that the questions presented by assignments of error to the overruling of objections to evidence, whether the prohibition agent who executed the search warrant was authorized to do so, and whether there was probable cause for the issuance of such warrant, were *res judicata* because those questions had either been determined, or could have been raised and determined, in the separate proceedings begun by Steele's petition for the return of

property and suppression of evidence. On the other hand, in *Gouled* v. *United States*, 255 U. S. 298, where the petition for the return of property was filed in the criminal case, the question certified to this Court, whether the District Court was required after having denied such petition to rule upon the same points again when raised in the form of objections to evidence, was answered in the affirmative, the Court saying (p. 313):

> In the case we are considering the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant.

So, also, in *Byars* v. *United States*, 273 U. S. 28, 29, and *Marron* v. *United States*, decided November 21, 1927, in each of which a petition for return of seized property, etc., was filed in the criminal case, this Court specifically referred to the fact that such prior petitions had been made and denied before ob-

jections upon the same grounds to evidence at the trial were overruled by the District Court.

These references to decisions of this Court show clearly the Court's view that where independent proceedings are brought to obtain the return of seized property and the suppression of evidence concerning it, the order of the court granting or denying the relief prayed is a final decision; but that where, as in the present instance, such relief is sought by a motion in a pending criminal case the order upon the motion is but interlocutory.

Petitioner cites *Trustees* v. *Greenough*, 105 U. S. 527; *United States* v. *River Rouge Co.*, 269 U. S. 411, and other cases, as instances in which orders rendered in pending cases were held subject to review. In those cases, however, the particular matter decided was plainly severable from the other issues in litigation, whereas in the instant case the motion denied by the District Court would, if granted, prevent the use of evidence without which it would be useless to proceed.

II

ALLEGED CONFLICT OF DECISIONS

Petitioner asserts a conflict between the decisions of the court below and that of the Circuit Court of Appeals for the Sixth Circuit in *Dowling* v. *Collins*, 10 F. (2d) 62. It is submitted that no such conflict exists. The grounds upon which the appeal in the

instant case was dismissed by the court below are thus stated by it in concluding its opinion (R. 34):

> A motion to suppress and surrender the evidence, made after indictment in such a case, appears to us no more than a step in preparation for the trial and the order as interlocutory.

In the *Dowling case* an original suit was brought to quash search warrants, to secure a return of the property seized thereunder, and to suppress the use of such property as evidence. As appears from the record in that case, the petitioner had previously moved for a return of the same property and for a suppression of evidence relating thereto prior to her trial in a criminal case. The motion was overruled and the evidence admitted at the trial over her objection. The jury failed to agree, however, and the case was set for retrial. Prior to the retrial the petitioner moved to quash the search warrant and to order the seized property returned. That motion was denied, but no trial was had as the jury was discharged because of petitioner's illness, which would prevent her being present. In this situation the original suit was brought. After a trial at which all the evidence in the previous criminal case was introduced, the District Court "overruled and dismissed" the petition on the grounds: (1) That petitioner having elected to test the validity of the seizure by motion in the criminal case, instead of by an independent proceeding, was estopped to bring the original suit; (2) that the

questions presented by the original petition were *res judicata* because of the orders on the motions in the criminal case; (3) that the search warrants were valid, and (4) that irrespective of the warrants the search and seizure was not unreasonable. In affirming the judgment, the Circuit Court of Appeals sustained the rulings of the District Court as to the estoppel and *res judicata*. It also declared that it fully concurred in the finding of the trial judge "that, irrespective of the validity of the search warrants, the search and seizure under the circumstances was not unreasonable."

It is true that in discussing the question of *res judicata* the Circuit Court of Appeals in the *Dowling case* treated the motions in the criminal case as independent proceedings and the orders denying them as final, and that to this extent its opinion is inconsistent with that of the court below in the instant case. The decision in the *Dowling case* was, however, fully supported by the court's conclusions as to the estoppel and as to the reasonableness of the search, questions which were in no way involved in the present case, and it is submitted that a conflict of decisions does not result merely because one of several grounds upon which a Circuit Court of Appeals has based its judgment is at variance with the ground upon which the judgment of another Circuit Court of Appeals has been rendered.

CONCLUSION

It is respectfully submitted that the petition should be denied.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

JOHN J. BYRNE,
Attorney.

MARCH, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 89

J. ROBERT COGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court (R. 11) is unreported. The opinion of the Circuit Court of Appeals (R. 15) is reported in 24 F. (2d) 308.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 29, 1928. (R. 19.) The petition for certiorari was filed March 9, 1928, and was granted April 23, 1928. (R. 20.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The single question in this case is whether an order of the District Court denying a motion for the return of seized papers and for the suppression of all evidence that might have been obtained therefrom, which motion was made in a pending criminal case before trial, was a final decision reviewable by the Circuit Court of Appeals.

STATEMENT

Following his indictment in the District Court of the United States for the Southern District of New York upon a charge of conspiracy to violate the National Prohibition Act, petitioner moved in that court for an order directing the United States Attorney to return to petitioner certain papers seized from his person and for the suppression of all evidence obtained therefrom. (R. 2.) The motion was entitled as in the criminal case. (R. 1.) As grounds therefor petitioner asserted in an accompanying affidavit that the papers in question had been taken in a search of his person by Prohibition Agent James J. Donovan immediately preceding petitioner's arrest by that officer, who had neither a search warrant nor a warrant of arrest and who did not have probable cause for belief that petitioner was committing an offense in his presence. (R. 2-4.)

In opposition to the motion the Government filed two affidavits. The first, made by Agent Donovan,

stated facts and circumstances tending to show probable cause for belief on the part of that officer that at the time of petitioner's arrest he was engaged in carrying out a conspiracy to violate the National Prohibition Act, and further declared that the affiant had searched the petitioner "after telling him that he was under arrest." (R. 5–7.) The second affidavit, sworn to by an Assistant United States Attorney, stated facts in corroboration of the first as to the existence of probable cause. (R. 7–8.) Petitioner filed a reply affidavit in which previous sworn statements by Agent Donovan were quoted as indicating that he did not have probable cause for arresting petitioner. (R. 8–10.)

Upon the evidence furnished by the foregoing affidavits the court found that the arrest had preceded the search and was upon probable cause. It accordingly denied the motion. (R. 11.) To review that order petitioner sued out a writ of error from the Circuit Court of Appeals, which dismissed the writ for want of jurisdiction on the ground that the order appealed from was an interlocutory order in the criminal case and was therefore not appealable. (R. 15–19.) This Court thereafter granted a writ of certiorari to review the judgment of the Circuit Court of Appeals. (R. 20.)

SUMMARY OF ARGUMENT

The order appealed from was interlocutory. It was rendered upon a motion concededly made in a

criminal case which is still pending. With certain exceptions immaterial here, Section 128 of the Judicial Code confers jurisdiction upon the Circuit Court of Appeals to review orders, judgments, and decrees of the District Courts only when they constitute "final decisions." This Court has repeatedly held that a decision is "final" for appellate purposes when it terminates the controversy between the parties and leaves nothing to be done except to enforce by execution what has been determined.

As apparent exceptions to the general rule, this Court has in certain cases recognized a right to appeal from orders rendered upon petitions or motions in pending cases. It has done so, however, upon the ground that the adjudication appealed from, although rendered prior to final judgment or decree in the main action, had fully disposed of matters which were separate and distinct from the general subject of the litigation. Petitioner's attempt to bring the instant case within the effect of these exceptional cases is futile. His motion asked, not only that the seized property be returned to him, but that the United States Attorney be enjoined from using it, or any information derived therefrom, as evidence in the criminal case "or to offer any testimony on any transaction mentioned in any of the seized papers." (R. 4.) Obviously, a motion in a criminal case praying that evidence in the hands of the prosecution be sup-

pressed in the trial of that case can not be regarded as so separate and distinct from the criminal case as to render the denial of the motion a final decision subject to review.

Except for the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Dowling* v. *Collins*, 10 F. (2d) 62, the lower Federal courts have consistently held against petitioner's contention upon the precise question here involved. The opinion in the *Dowling case* was based upon an erroneous conception of the rulings of this Court in *Perlman* v. *United States*, 247 U. S. 7, and *Burdeau* v. *McDowell*, 256 U. S. 465. The orders reviewed by this Court in the latter two cases disposed of petitions which were filed when there were no other pending proceedings, civil or criminal, to which the petitioners were parties. As the orders in those cases finally terminated the proceedings in which they were rendered they were essentially final and reviewable.

The remaining decisions of this Court relied upon by petitioner distinguished.

ARGUMENT

THE ORDER APPEALED FROM WAS INTERLOCUTORY

(a) The proceeding in which the order was rendered is inseparable from the criminal case which is still undetermined

Petitioner's application for the return of seized papers and for the suppression of all evidence ob-

tained therefrom was entitled as in the criminal case then pending against him. The "Notice of Motion," addressed to the United States Attorney, informed that "the undersigned will move this Court on the 7th day of November, 1927," for an order granting the relief prayed. (R. 2.) The application constituted, therefore, a motion in the criminal case. Petitioner does not dispute this, but, on the contrary, states his position as follows (Br. 6).

> The petitioner's contention is that such a motion is a special proceeding *and if indictment is pending it is a special proceeding in the criminal case*, and the order on the application finally determines the rights of the parties in the subject matter. (Italics ours.)

Unless the order denying the motion was a "final decision," the Circuit Court of Appeals had no jurisdiction to review it, Sec. 128, Judicial Code; *Ex parte Tiffany*, 252 U. S. 32, 36. What constitutes a final decision, judgment, or decree, for appellate purposes, has been many times announced by this Court. As stated by Chief Justice Waite in *St. Louis, Iron Mountain & Southern R. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28:

> • • • a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.

Likewise, in *McLish* v. *Roff*, 141 U. S. 661, 665, this Court declared:

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error, * * * have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

See also *Heike* v. *United States*, 217 U. S. 423, 429; *United States* v. *Beatty*, 232 U. S. 463, 466; *Collins* v. *Miller*, 252 U. S. 364, 370.

Notwithstanding the rule above stated, it has been held by this Court that an adjudication of a claim to property presented by an intervening petition in receivership proceedings was final without awaiting the termination of the principal litigation, *Trustees* v. *Greenough*, 105 U. S. 527, 531; *Williams* v. *Morgan*, 111 U. S. 684, 699; *Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, 225; that a judgment finding the defendants in an equity suit guilty of contempt in violating an interlocutory injunction was reviewable as a final determination of a criminal proceeding against the contemnors, *Matter of Christensen Engineering Co.*, 194 U. S. 458, 461, and that an order of a Federal District Court denying the application of the receiver of an insolvent corporation appointed by a State court for an order turning over

to him assets of the corporation in the hands of a receiver previously appointed by the Federal court, was a final and reviewable decision, *Ex parte Tiffany*, 252 U. S. 32, 36. The decisions in these and other similar cases are, however, only apparent exceptions to the general rule, for in each instance this Court made plain that the ground upon which it held that an appeal lay was that the adjudication appealed from, although rendered prior to final judgment or decree in the main action, had finally disposed of matters which were separate and distinct from the general subject of the litigation.

Recognizing the force of the general rule, petitioner seeks to bring the instant case within the effect of the foregoing exceptional cases by asserting that the proceeding begun by his motion in the criminal case was a "special proceeding" independent of that case, and that the order denying the motion and terminating the proceeding was therefore a final decision subject to review. He argues (Br. 10) that the controversy as a whole is between the United States, on the one hand, and Cogen and his codefendants, on the other, the issue for determination being whether the defendants are guilty of the crime of conspiracy, whereas the matter for determination upon the motion to return seized property and suppress evidence is whether the United States Attorney or Cogen is rightfully entitled to said property. It is submitted that this is not a correct statement of the matters involved.

It is true that the ultimate issue for determination in the criminal case is the guilt of the defendants, but long before that issue is ripe for submission to the jury many minor issues are likely to arise for decision, among them (unless this Court should reverse the judgment of the Circuit Court of Appeals dismissing petitioner's appeal and the latter court should reverse the order of the District Court denying his motion), whether the property seized from petitioner's person, or information gained therefrom, may lawfully be introduced in evidence against him at the trial. Furthermore, the manifest object of petitioner's motion was to prevent the use of such evidence at the trial. Not only did he ask in his motion for the suppression of all evidence obtained from the seized papers (R. 2), but in the affidavit which accompanied the motion he stated (R. 4):

> I am further informed and believe that some or all of these papers, or copies thereof, have been turned over by the said Prohibition Agent, James J. Donovan, to the United States Attorney, or his Assistants, and that these papers, memoranda, books, documents, etc., are intended to be used by the United States Attorney, or his Assistants, upon the trial of the Indictment now pending against me and of using the information obtained therefrom at the said trial.
>
> * * * * *
>
> That this affidavit is made for the purpose of the issuance of an order for the return

> of all the books, papers, memoranda, etc., seized, as aforesaid, together with all copies thereof, and for a further order to the United States Attorney directing him, or his assistants, not to offer the same in evidence or to offer any testimony on any transaction mentioned in any of the seized papers upon the trial. * * *.

A motion thus made in a criminal case, asking that the use at the trial of evidence in the possession of the prosecuting officers be suppressed, does not constitute a proceeding so separate and distinct from the criminal case that an order denying the motion is a final and reviewable decision.

(*b*) *With but one exception the courts dealing with the precise question here involved have consistently ruled against petitioner's contention*

The great weight of authority is against the right to appeal from an order such as that rendered by the District Court in this case. In *Coastwise Lumber & Supply Co.* v. *United States* (C. C. A., 2d), 259 Fed. 847, books and papers of the Coastwise Company were seized upon search warrants and impounded by order of the District Court for use in the trial of indictments pending against the company and certain individual defendants. The court thereafter entered an order denying an application by the company for the return of the seized property, and the company sued out a writ of error from the Circuit Court of Appeals to review that order. In an opinion dismissing the writ

for want of jurisdiction, the Circuit Court of Appeals said (p. 848–849):

> The government at the outset makes the objection that the order is interlocutory, and therefore not appealable, because our appellate jurisdiction is restricted to final decisions of the District Courts, with exceptions not material here. Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133, Sec. 128).
>
> It seems to us quite manifest that the search warrants were issued in the criminal action. They describe the property authorized to be seized as being used to commit a felony, viz. a conspiracy to defraud the United States in violation of section 37 of the Penal Code. The individual defendants had been already arrested on this charge, and all the defendants were under indictment before the Coastwise Company made its demand for a hearing before the United States commissioners under Sections 15 and 16 of title 11 of the act of June 15, 1917, and of course before this petition was filed in the District Court.
>
> It may be suggested that the petition was an independent proceeding because the notice of motion and the affidavit in support of it were entitled "In re Books and Papers of the Coastwise Lumber & Supply Company, a Corporation," and the subsequent proceedings were entitled in a similar way. We regard the form of title used as of little importance. The material consideration is whether the demand was made in the criminal action

> or as an independent special proceeding. A defendant can not make an interlocutory order final by the choice of any particular form of title. All the earlier proceedings were entitled in the criminal action "United States of America against Coastwise Lumber & Supply Company, Inc.," and the other defendants. The particular order sought to be reviewed describes the books and papers as impounded "to aid the government in the prosecution of indictments against the said corporation and other defendants mentioned in said indictments," and in his opinion the District Judge describes the Coastwise Company, the petitioner, as the defendant, saying: "* * * Inasmuch as it appears that all of the papers are absolutely necessary to the government's case against the defendant, I am not disposed to interfere with the impounding order."

In *United States* v. *Marcus* (S. D. N. Y.), 266 Fed. 713, Circuit Judge Hough, sitting as a District Court, denied a motion made in a criminal case for the return of seized property. Speaking of the effect of that decision in a memorandum opinion, he said (p. 719):

> Using the word "effect" as meaning lasting or permanent influence, this decision has no effect of importance. It permits the United States attorney to keep the book, and is not reviewable (*Coastwise, etc., Co.* v. *United States*, 259 Fed. 847); but the reason why an application of this kind by a party

> can not be reviewed is that the order on this decision is interlocutory * * *.
>
> Whether the decision and its distinction is right or not, it is the ruling in this circuit; wherefore, if and when this book is offered in evidence, it seems that the defendant affected can either rest on the error he will believe to exist in this "interlocutory" ruling of mine or renew his argument by appropriate objection to admission in evidence, or do both. At all events, nothing is or can be settled either by this decision or any immediate review of it.

In *United States* v. *Marquette* (C. C. A., 9th), 270 Fed. 214, the Government appealed from an order of the District Court directing the return of seized liquors upon a petition filed in a criminal case. The appeal was dismissed by the Circuit Court of Appeals for want of jurisdiction, the court saying (pp. 214–215):

> The appellees have moved to dismiss the appeal, on the ground that the order is not final, and therefore no appeal will lie. This motion must be granted. It is well settled that interlocutory orders such as this are not appealable. *Coastwise Lumber & Supply Co.* v. *U. S.*, 259 Fed. 847; *U. S.* v. *Marasca* (D. C.) 266 Fed. 713; *Crooker* v. *Knudsen*, 232 Fed. 857.
>
> The argument on the part of the government that a plenary suit in replevin or claim and delivery might have been instituted for the recovery of the property, and that

> an appeal or writ of error would lie from the final judgment is beside the question. The court below did not assume jurisdiction for the purpose of trying title or right of possession, but merely to prevent the use of the property wrongfully seized as evidence upon the trial of the criminal charge, and the order directing a return of the property to avoid that result is no more final or appealable than would be any other order excluding testimony on the trial.

In *Voorhies* v. *United States* (C. C. A., 5th), 299 Fed. 275, the Circuit Court of Appeals, denying a motion by the Government to dismiss, retained a writ of error to review an order of a District Court denying a petition for the return of seized liquor. It did so, however, on the ground that the petition was not filed in any pending case. It said (p. 276):

> The government moves to dismiss the writ of error on the ground that the judgment of the District Court is not final. So far as the record before us discloses, this is an independent action, and is not incidental to a criminal prosecution or other original proceeding. The motion to dismiss is therefore denied.

That an independent proceeding may be brought for the return of property alleged to have been illegally seized was held in *Petition of Barber* (E. D. Mich.), 281 Fed. 550. Overruling an objection by the Government that the court had no jurisdic-

tion to entertain the petition filed in that case, District Judge Tuttle said (pp. 552–553):

> A preliminary objection by the government to the jurisdiction of this court to proceed in this cause must be first considered. It is contended by the government that this petition should not have been filed as the commencement of a new cause, but should have been presented in the proceeding in which the search warrant itself was issued. Section 25 of the National Prohibition Act (41 Stat. 315) provides that property seized under the search warrant therein authorized "shall be subject to such disposition as the court may make thereof." I discover no reason, based either on authority or on principle, and none has been brought to my attention, why this court may not or should not entertain and pass on a petition such as that here under consideration, filed in an independent cause for the purpose of seeking a return of property alleged to have been taken on an illegal search warrant. The objection by the government to the contrary must be overruled.

Veeder v. *United States* (C. C. A., 7th), 252 Fed. 414, was a proceeding by the United States for the issuance of a warrant to search for and seize certain books and papers in the possession of Veeder. The warrant issued and Veeder sued out a writ of error from the Circuit Court of Appeals, where the action of the District Court was reversed with direction to quash the search warrant. No question

of the jurisdiction of the Circuit Court of Appeals appears to have been raised in or decided by that court. As, however, the application for search warrant was not a proceeding in any pending case, the order of the District Court directing the warrant to issue was obviously a final, as distinguished from an interlocutory, decision.

In *United States* v. *Broude* (Minn.), 299 Fed. 332, District Judge McGee, having denied a motion made in a pending criminal case for the return of seized liquors, refused to allow a writ of error to review that decision on the ground that it was interlocutory only. His reasons may not have justified the refusal to allow the writ of error, but they show that if the writ had been allowed the Circuit Court of Appeals must have held the order not reviewable. Distinguishing the case before him from the decision of this Court in *Perlman* v. *United States*, 247 U. S. 7, as well as from the *Veeder case*, *supra*, he said (p. 337):

> In both the Perlman and the Veeder Cases, on a bare statement of the facts, it is apparent that they were independent special proceedings, and that the decision in each was a final decision to which a writ of error would lie. In the instant case no attack was made upon the search warrant, nor upon any proceeding had under it, until four days after the informations were filed against the defendants, and after they

had been arraigned and pleaded not guilty to the same. * * *

* * * * *

Considering the policy of Congress, as evidenced by all legislation on the subject from 1789, at least, to restrict appeals and writs of error to judgments, decrees, and decisions that are final, it can not be held a permissible construction of section 6 of the Act of March 3, 1891, to hold that an order of a District Court denying a motion to quash a search warrant, or an order refusing to direct the return of property seized under it, which leaves the action in which the order was made pending and undetermined, is a final decision to which a writ of error will lie. I am of the opinion that such a construction placed upon section 6 would be a perversion of the meaning of that section and not consistent with the policy of the law embodied in it.

The precise question under consideration has been directly passed upon and decided adversely to the petitioners herein in the Circuit Courts of Appeal of the Second and Ninth Circuits and by the Court of Appeals of the District of Columbia. *United States* v. *Maresca* (D. C. S. D. N. Y.) 266 Fed. 713; *United States* v. *Marquette* (C. C. A. 9) 270 Fed. 214, 215; *Coastwise Lumber Co.* v. *United States* (C. C. A. 2) 259 Fed. 847, 849; *United States* v. *Mattingly*, 285 Fed. 921, 923, 924. No case has been called to my attention, nor have I been able to find one,

> in which the precise question under consideration was involved, in which a conclusion was reached at variance with the views expressed in the cases last cited.

In *Jacobs* v. *United States* (C. C. A., 9th), 8 F. (2d) 981, the defendants, prior to trial upon an information charging violation of the National Prohibition Act, filed a petition in the criminal case praying that a search warrant be quashed; that the property seized under the warrant be suppressed as evidence, and that the information be dismissed. From an order denying the petition, they sued out a writ of error from the Circuit Court of Appeals, which, upon motion of the Government, dismissed the writ as addressed to an order of the District Court which was but interlocutory and therefore not appealable. In the course of an opinion in which most of the cases heretofore referred to in this brief were approvingly cited, the Circuit Court of Appeals said (p. 982):

> The matter is clarified by observing that, where a stranger to the suit or to the intended suit petitions for the return of property and his petition is denied, the order is final as to him, for unless he can sue out a writ of error he would be remediless. But where one is a party to a criminal action pending, and petitions for the return of property that has been seized under a warrant, and which is to be used in evidence upon the trial of the criminal action, the ruling

> upon his petition is upon an intervening matter, and is not a final decision.

A view similar to that announced by the lower Federal courts in the foregoing cases was expressed by this Court in *Wise* v. *Mills*, 220 U. S. 549. The record in that case shows that subsequent to his indictment in the Circuit Court of the United States for the Southern District of New York, Mills filed in that court a petition, entitled as in the criminal case, praying the return to him of books and papers which had been seized upon his premises by the United States Marshal immediately following the execution by that officer of a warrant for his arrest. The Circuit Court found that the documents in question had been taken in violation of the petitioner's rights under the Fourth Amendment and issued an order directing the United States Attorney, to whom they had been delivered by the Marshal, to return them to the petitioner. The United States Attorney refused to obey this order and, being adjudged in contempt of court, sued out a direct writ of error from this Court. In the course of an opinion dismissing the writ for want of jurisdiction the Court said (p. 554):

> The only ground stated in the assignments of error which in the remotest degree refers to a matter which would come within our right to review is the third assignment, which asserts: "The court erred in adjudging that the taking into custody of said books and

> papers at the time of the lawful arrest of said Lawrence H. Mills, Charles G. Mourraille and Emil S. Duflot was in violation of the provisions of the Constitution of the United States." • • • But it is obvious on the face of the record that the error thus assigned and the discussion at bar in regard to it concern themselves, not with the order which it is sought to review, that is, the commitment for contempt, *but to another and different order not final in its character, that is, the order of the court directing the return of the books and papers. Alexander v. United States*, 201 U. S. 117. (Italic ours.)

And on page 555 the Court points out the misconception of the plaintiff in error in assuming "that the right to have a direct review of the final contempt order carries with it the right to have at the same time a review of *the interlocutory order returning the books.*" (Italics ours.)

The Dowling Case

So far as diligent search has revealed, the only dissent from the otherwise unbroken line of Federal decision upon the question of appeal involved in this case is to be found in the decision of the Circuit Court of Appeals for the Sixth Circuit in *Dowling* v. *Collins*, 10 F. (2d) 62. That was an original suit brought to quash search warrants, to secure a return of the property seized thereunder, and to suppress the use of such property as evidence. As appears from the record in that case,

the petitioner had previously moved for a return of the same property and for a suppression of evidence relating thereto prior to her trial in a criminal case. The motion was overruled and the evidence admitted at the trial over her objection. The jury failed to agree, however, and the case was set for retrial. Prior to the retrial the petitioner moved to quash the search warrants and to order the seized property returned. That motion was denied, but no trial was had as the jury was discharged because of the petitioner's illness, which would prevent her being present. In this situation the original suit was brought. After a trial at which all the evidence in the previous criminal case was introduced, the District Court dismissed the petition on the grounds, among others, (1) That petitioner having elected to test the validity of the seizure by motion in the criminal case, instead of by an independent proceeding, was estopped to bring the original suit, and (2) that the questions presented by the original petition were *res judicata* because of the orders on the motions in the criminal case. Upon writ of error the Circuit Court of Appeals sustained the rulings of the District Court both as to the estoppel and *res judicata* and affirmed the judgment. Regarding the question of *res judicata*, following its previous opinion in *MacDaniel* v. *United States*, 294 Fed. 769, 774, it said (p. 64):

> The reasoning of the opinion in *Perlman* v. *U. S.*, 247 U. S. 7, as well as in *Burdeau*

> v. *McDowell*, 256 U. S. 465, fully supports the conclusion that the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this court; though entitled in that criminal case, they were no essential part of the trial therein; as preliminary matters they were as independent therefrom as were the petitions in the *Perlman* and *Burdeau cases*.

It is submitted that the decisions of this Court in the *Perlman* and *Burdeau cases* will not bear the construction there placed upon them. As hereinafter shown, the petitions in those cases were filed at a time when there were no other court proceedings, civil or criminal, pending to which the petitioners were parties. The orders denying the petitions were, therefore, necessarily final decisions for the purpose of review in this Court, and there is nothing in either opinion upon which to base the assumption that the Court would have exercised jurisdiction to review the orders appealed from had they been rendered in pending cases and that fact had been called to its attention.

(c) *The decisions of this Court upon which petitioner relies are distinguishable from the case at bar.*

Petitioner places strong reliance upon the decisions of this Court in *Perlman* v. *United States*, 247 U. S. 7; *Burdeau* v. *McDowell*, 256 U. S. 465; *Essgee Co.* v. *United States*, 262 U. S. 151, and *Steele*

v. *United States* No. 1, 267 U. S. 498, as establishing his right to appeal from the order rendered by the District Court in this case. A brief survey of the cases cited will show, however, that they lend no support to petitioner's contention. In the *Perlman case* a prior patent suit in which Perlman had appeared as a witness and in which articles belonging to him had been received as exhibits, was dismissed without prejudice, but the exhibits were impounded by order of the court. The United States Attorney thereafter instituted proceedings before a grand jury for an indictment of Perlman for perjury committed while testifying in the patent case, and applied to the court for an order directing the clerk to produce the aforesaid exhibits before the grand jury. A countervailing petition by Perlman, that the use of said exhibits as evidence by the United States Attorney be enjoined, was denied; the application of the United States Attorney was granted, and Perlman appealed directly to this Court. The Government moved to dismiss the appeal on the ground, among others, that "The order of the District Court if considered as a part of the criminal proceeding is not final, but merely interlocutory, and therefore not reviewable by this court." In denying the motion this Court said (p. 12):

> The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a pro-

> ceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

In referring to the criminal action as not yet brought notwithstanding the proceedings before the grand jury, the Court undoubtedly had in mind the rule announced in *Post* v. *United States*, 161 U. S. 583, 587, as follows:

> Criminal proceedings can not be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. *Virginia* v. *Paul*, 148 U. S. 107, 119, 121; *Rex.* v. *Phillips, Russ. & Ry.* 369; *Regina* v. *Parker, Leigh & Cave*, 459; S. C. 9 Cox Crim. Cas. 475. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced; the grand jury may ignore the bill, and decline to find any indictment; and it can not be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court.

As, therefore, when the order reviewed in the *Perlman case* was made the proposed criminal action had not been brought and the civil action had been dismissed, the only proceedings pending were those involving the use of the exhibits as evidence before the grand jury, and as those proceedings were fully terminated by the order it was necessarily a final order subject to review.

In the *McDowell case* the petition prayed the return to McDowell of papers which had been stolen from him and turned over to Burdeau, a Special Assistant to the Attorney General, who proposed to use them as evidence before a grand jury to secure an indictment of McDowell for fraudulent use of the mails. The District Court granted the petition and Burdeau sought review of that order upon a direct appeal to this Court. As no criminal case against McDowell was pending and the order appealed from completely disposed of the proceedings in which it was rendered, it was obviously a final order for appellate purposes.

In *Essgee Co. v. United States* the petitions for the return of books and papers were filed after indictments had been returned against the petitioners. The petitions were not entitled as in the criminal cases, however, but were plainly intended by the petitioners and treated by the District Court as the beginning of new and independent proceedings. Review of the orders denying the petitions was sought in this Court both on writ of error and

appeal. In the Government's brief filed in this Court (October Term, 1922, Nos. 706, 707) the first point argued was that the Court was without jurisdiction because the orders appealed from were interlocutory. It was urged that *Burdeau* v. *McDowell* and *Perlman* v. *United States, supra*, were distinguishable in that in those cases there were no criminal actions pending, and that the proceedings were, therefore, entirely independent and the orders rendered therein essentially final. In its decision subsequently handed down this Court, while pointing out that appeal, rather than writ of error, was the proper mode of review, said nothing regarding the finality for appellate purposes of the orders under review, but proceeded to a determination of their correctness on the merits. It would appear to be plain, therefore, that this Court regarded the proceedings in which the orders reviewed by it were rendered as being fully as independent of any pending case as were the proceedings reviewed in the *Burdeau* and *Perlman cases*.

In the *Steele case* prohibition agents executing a warrant to search Steele's premises found and seized intoxicating liquor. Steele thereupon appeared in the commissioner's court and moved that the warrant be quashed and the liquor returned on the ground that "the search was clearly in violation of the Fourth Amendment to the Constitution of the United States" (Transcript in No. 235, October Term, 1924, page 10). The commissioner overruled the motion on August 29, 1923. (*Id.* p.

46.) The information against Steele was filed thereafter. Steele then filed an application in the District Court for a review of the proceedings before the commissioner and for an order quashing the warrant and directing a return of the seized property. The District Court denied the application and its order was affirmed by this Court upon a direct appeal. No reference to any pending criminal case was made in the title of the petition, in the petition itself, or anywhere else in the record of the proceedings in the District Court. The proceedings, begun before the Commissioner, were plainly independent of the criminal case which arose later and came to this Court upon a separate record and was disposed of as a separate case. *Steele* v. *United States*, No. 1 (267 U. S. 498) came up on appeal, and *Steele* v. *United States* No. 2 (267 U. S. 505), came up on writ of error.

It is apparent, therefore, that none of the foregoing decisions of this Court cited by petitioner is authority for his contention that an order denying a motion in a criminal case for the return of seized property and for the suppression of its use as evidence is a final decision subject to review.

If petitioner were correct in his assertion that the order of the District Court in the instant case finally disposed of special proceedings which were separate and distinct from the criminal case in which the motion overruled by said order was made, it would follow that all questions involving the

validity of the seizure would be *res judicata* and could not again be passed upon by the court in considering objections to evidence at the trial.

In *Steele* v. *United States No. 2, supra,* it was held that the questions presented by assignments of error to the overruling of objections to evidence, whether the prohibition agent who executed the search warrant was authorized to do so, and whether there was probable cause for the issuance of such warrant, were *res judicata* because those questions had either been determined, or could have been raised and determined, in the separate proceedings begun by Steele's petition for the return of property and suppression of evidence. On the other hand, in *Gouled* v. *United States,* 255 U. S. 298, where the petition for the return of property was filed in the criminal case, the question certified to this Court, whether the District Court was required after having denied such petition to rule upon the same points again when raised in the form of objections to evidence, was answered in the affirmative, the Court saying (p. 313):

> In the case we are considering the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become

> apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant.

So, also, in *Byars* v. *United States*, 273 U. S. 28, 29, and *Marron* v. *United States*, 275 U. S. 192, 194, in each of which a petition for return of seized property, etc., was filed in the criminal case, this Court specifically referred to the fact that such prior petitions had been made and denied before objections upon the same grounds to evidence at the trial were overruled by the District Court.

These references to decisions of this Court show clearly the Court's view that where independent proceedings are brought to obtain the return of seized property and the suppression of evidence concerning it, the order of the court granting or denying the relief prayed is a final decision; but that where, as in the present instance, such relief is sought by a motion in a pending criminal case the order upon the motion is but interlocutory.

The language quoted by petitioner from *Segurola* v. *United States*, 275 U. S. 106, 111, comprises an excerpt from a restatement by this Court of the principle laid down in *Adams* v. *New York*, 192 U. S. 585, and recognized in *Weeks* v. *United States*, 232 U. S. 383, 395, and in *Marron* v. *United States*, 275 U. S. 192, 194, that, except where there

has been no opportunity to present the question in advance of the trial, "a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence."

This is construed by petitioner as holding that where such an objection to a seizure has been made before trial the defendant can not object to the introduction of the seized property in evidence at the trial, and upon this construction he bases the argument that unless an appeal will lie to the overruling of his motion made before trial in the instant case, he will have no right of appeal therefrom at all because he can not raise the question at the trial and his bill of exceptions will accordingly fail to show his grievance. But this Court neither said, nor, it is submitted, did it intend to hold, in the *Segurola case*, that such an objection made and denied before trial precludes the defendant from objecting upon the same grounds to the introduction of the seized property in evidence at the trial or from obtaining a review of the order on the application or motion on the record of the whole case on appeal. The contrary was specifically held in *Gouled* v. *United States, supra*, and the procedure was followed, with the sanction of this Court, in the late cases of *Byars* v. *United States, supra*, and *Marron* v. *United States, supra*.

CONCLUSION

The Government does not oppose a review of this case on its merits. But having regard to the policy of the law of avoiding piecemeal appeals and of securing the orderly progress of a cause, it believes that such review should be had on appeal from the conviction, if any there be. There are several contingencies which may render appeals from such interlocutory orders wholly superfluous, the only net result being delays in the administration of justice.

It is submitted, therefore, that the Circuit Court of Appeals correctly dismissed the writ of error in this case and that its judgment should be affirmed.

Respectfully,

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